(6)

No. 89-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF PETITIONER

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Respondent's argument that the decision below fails to raise any important or recurring issue of federal law (Opp. 6, 15, 21) is repudiated by the participation of the *amicus* supporting the respondent which represents "more than 40,000 college and university faculty members and research scholars," Brief of American Association of University Professors as *Amicus Curiae* in Opposition ("AAUP Opp.") at 2, and by the *amicus* supporting the petitioner which represents "more than 1500 colleges and universities." Brief of American Council on Education as *Amicus Curiae* in Support ("ACE in Supp.") at 1. It is simply impossible to reconcile respondent's assertion that this case "does [not] raise any issue of a pressing nature," (Opp. 6) with the appearance of the entire academic community at the certiorari stage.

Respondent's opposition implicitly concedes, in addition, that there is a conflict in the circuits on the first

issue presented, weakly insisting only that the conflict is not "clear." Opp. 6. At bottom, respondent's effort to recast the decision below as a simple "application of well-settled law to the particular facts of the case before it," (*id.*) cannot withstand scrutiny.[1]

I.

A. Both respondent and the AAUP *amicus* strain to diminish the conflict between the opinion below and the Sixth Circuit's opinion in *Gutzwiller* v. *Fenik*, 860 F.2d 1317 (6th Cir. 1988), by arguing simply that the decision below is limited to the facts presented and does not "state a general rule" to govern tenure cases. Opp. 5-6. Of course, given a similarly begrudging reading, the holding of virtually any case could be limited to its facts; taken to its logical conclusion, respondent's approach to

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[1] Respondent's continued mischaracterization of the strength of her tenure candidacy must be corrected at the outset. Contrary to her suggestion, this is not a case in which one "individual (the University President) . . . effected the discrimination." Opp. 11. Serious reservations regarding the quality of respondent's scholarship were raised by various individuals at almost every level of her tenure review, including the Dean of CLA, the Assistant University Provost, the University Provost, the University President, and finally all three members of the ad hoc Tenure Review Committee. Pet. 3-7. Moreover, the First Circuit ruled that the district court "probably" erred in excluding testimony offered by Boston University that would have demonstrated that members of the College APT Committee also had reservations about the quality of Brown's scholarship and believed "that progress on [a second book] was important." Pet. App. 20a. Indeed, as the American Council on Education concludes, "the record reflects that the case for mandated tenure for the respondent is, at best, mixed and ambiguous." ACE in Supp. 1 n.3.

Finally, respondent "dissimulates" when she suggests that "[i]f the president's vote were to be disregarded, the outcome would be a positive tenure award, based on the recommendation of the ad hoc committee," (Opp. 11-12) because she simply ignores the fact that the ad hoc TRC members were not directed to consider an extension of respondent's probationary period. C.A. App. 671, 756.

case law would completely eviscerate the value of precedent.[2]

Here, examination of the rationale of the decision below undermines entirely the respondent's efforts to minimize the First Circuit's holding. The court could not more clearly state its view that "once a University has been found to have impermissibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII." Pet. App. 48a. Thus, following the decision in this case, "an award of tenure is presumptively correct because '[a]warding [a successful Title VII complainant] tenure is the *only* way to provide her the most complete relief possible,'" consistent with the goals embodied in Title VII. Pet. 19 (quoting decision below, Pet. App. 49a (emphasis added)). Although the court below noted the argument that (consistent with the Sixth Circuit approach) the court should consider less restrictive alternatives to an award of lifetime tenure, the First Circuit flatly rejected any alternatives. Pet App. 49a.[3] Indeed, nothing in the court's opinion offers even the slightest hint that consideration of such alternatives *might ever* be appropriate. *Id.*

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[2] Despite the reliance by the respondent (Opp. 6, 9, 11) and the AAUP (AAUP Opp. 5, 8) on the "fact-dependent" nature of the First Circuit's rule, nothing to support this argument appears in the First Circuit's *opinion*. Additionally, notwithstanding the illusion created by the AAUP, (AAUP Opp. *passim*) its policy statements and reports are not widely accepted, objective standards for the academic community. See Furniss, *The Status of "AAUP Policy,"* 59 Educ. Rec. 7, 7-29 (1978).

[3] Contrary to the First Circuit's view, repeated in the AAUP amicus brief (AAUP Opp. 7 n.5), the University's offer of a three year extension to respondent was not itself found to be discriminatory. Pet. App. 49a. Instead, the jury answered only the following question affirmatively: "Do you find that the Trustees of Boston University refused to grant tenure to the plaintiff because of her sex?". C.A. App. 538.

Such an approach stands in stark contrast to the Sixth Circuit's approach in *Gutzwiller* and *Ford* v. *Nicks*, 866 F.2d 865 (6th Cir. 1989), *overruled on other grounds, Minority Employees of the Tennessee Dep't of Employment Security* v. *Tennessee*, No. 88-5429 (6th Cir. Apr. 26, 1990) (en banc) (effect of "et. al" in notice of appeal under Fed. R. App. P. 3 (c)). In both those cases, the Sixth Circuit affirmed the lower courts' findings that the colleges in question had discriminated against female faculty members in violation of Title VII.[4] The Sixth Circuit also recognized that a successful Title VII plaintiff generally should be made "whole for injuries suffered on account of unlawful employment discrimination." *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 875. Nevertheless, in *Gutzwiller* and *Ford*, the court adopted and then applied a rule that *mandates* the consideration of a less restrictive alternative to an immediate order of tenure in the university context.[5]

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[4] A careful comparison of the underlying facts in *Gutzwiller* with those presented here demonstrates a far greater similarity than respondent is willing to admit. First, both respondent here and plaintiff in *Gutzwiller* alleged that they were held to higher publishing standards than their male counterparts, a fact respondent apparently concedes. Opp. 10 n.6. In addition, Professor Gutzwiller complained, like respondent here, that various reviewers in her tenure deliberations unduly emphasized negative aspects of "what were generally favorable evaluations of Gutzwiller's scholarship." 860 F.2d at 1326. Finally, many outside evaluations of Professor Gutzwiller's work "*generously praise*[d her] published writing and assert[ed] that the work in progress . . . show[ed] the writer growing in critical sophistication [with] promise for her scholarly future." *Id.* (emphasis in original).

Despite acknowledging that this evidence supported a finding of sexual discrimination, *id.* at 1326-27, the Sixth Circuit (unlike the First Circuit here) nevertheless refused to order an award of reinstatement with tenure, declined to read into the record any finding that an unbiased reconsideration of tenure was impossible at the University, and remanded the case for consideration of a less restrictive alternative. *Id.* at 1333.

[5] *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 877. Respondent and its amicus misstate petitioner's argument before this Court. Petitioner contends that the Sixth Circuit's rule requiring con-

The Sixth Circuit, in contrast to the court below, reasoned that "[w]hile a few courts have indicated a willingness to award reinstatement with tenure . . . we believe that such relief will, in most cases, entangle the courts in matters best left to academic professionals." *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 877.[6] The court therefore held that reinstatement with tenure should be awarded in "only the most exceptional cases" when a reviewing "court is convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration (*i.e.*, consideration without the taint of discrimination)" and remanded the case for consideration of less restrictive alternatives.[7] Thus, if this case had arisen in the Sixth Circuit, instead of the First Circuit, the district court's order of an "automatic"

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sideration of a less restrictive alternative, *i.e.*, an unbiased tenure decision is an appropriate accommodation of the government's legitimate Title VII interest and a University's first amendment protected right to determine *on academic grounds* "who may teach."

[6] Respondent's attempt to suggest that "any tenure case which survives the [First Circuit's] review is exceptional, since the court of appeals' requirements for a finding of *liability* in a tenure challenge [are] so demanding" is completely gratuitous. Opp. 8 (emphasis added). Respondent simply can provide no support for their *suggestion* that the standard for Title VII liability in the Sixth Circuit differs from the prevailing standard in the First Circuit.

[7] 860 F.2d at 1333; 866 F.2d at 877. Respondent's suggestion that consideration of a less restrictive alternative here "would serve no purpose" (Opp. 12) misperceives the Sixth Circuit's ruling in *Gutzwiller*. First, there has been no finding by the lower court that an unbiased consideration of respondent's case would be impossible. At the very minimum, petitioner would be entitled to a separate hearing on that issue under the Sixth Circuit's rule. Second, there has been no showing that the relevant decisionmakers at the University would be the same. For example, and contrary to respondent's suggestion, (Opp. 11) President Silber is on leave from the University. The current *president ad interim*, Jon Westling, took no part in the decision to deny respondent tenure.

award of tenure would have been reversed.[8] In light of this clear conflict in the circuits, the Court should grant the petition to restore uniformity on this important issue of federal law.

B. Notwithstanding respondent's representations to the contrary, the order below granting reinstatement with tenure represents a "*direct* infringement on the [University's] asserted right to 'determine for itself on academic grounds who may teach.'" *University of Pennsylvania* v. *E.E.O.C.*, 110 S.Ct. 577, 587 (1990) (emphasis in original) (citation omitted). At bottom, the flaw with the First Circuit's approach is that it fails to accord sufficient deference to the University's "independent judgment in choosing faculty," Pet. 23 n.17, and permits the court or jury to "*substitute* its teaching employment criteria for those already in place at the academic institutions, [thereby] directly and completely usurping the discretion of [the] institution." *University of Pennsylvania*, 110 S.Ct. at 587 (emphasis in original).

As the American Council on Education notes in its brief in support of the petition, the danger from the usurpation of a University's tenure decisionmaking is no small matter: because the "very essence" of a University "depends upon the quality of its faculty—especially its tenured faculty," its tenure decisionmakers have "the ultimate responsibility for a university's continuance as a viable educational entity and as a contributor to the betterment of the society in which it exists." ACE in

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[8] Both respondent and its supporting *amicus* virtually ignore the Sixth Circuit's holding in *Ford* reversing an award of reinstatement with tenure. 866 F.2d at 877. In *Ford*, the Sixth Circuit affirmed the district court's finding that the University's proffered justifications for failing to re-hire plaintiff were pretextual—concluding that the University's concepts of teaching "'specialties' and . . . the qualifications necessary to teach them" were stretched "to come up with a post hoc rationalization of its position." *Id.* at 871-72. Even this evidence was insufficient, however, to justify the trial court's award of lifetime tenure. *Id.* at 877.

Supp. at 3-4. In light of this Court's longstanding recognition of "the crucial role universities play in the dissemination of ideas in our society," *University of Pennsylvania*, 110 S.Ct. at 585, the petition for certiorari should be granted.

II.

In response to the question presented regarding the proper standard for "harmless error" review of a constitutional error, respondent first makes the remarkable argument that review of this issue was waived because it "was [not] presented to or decided by the district court or the court of appeals." Opp. 18-19 (citing Petitioner's Motion for Judgment Notwithstanding the Verdict, reproduced as Appendix A to Opp.). But an issue of "harmless error" review is, by definition, an issue of appellate decisionmaking, which is not even ripe until after the court of appeals has issued its opinion. Certainly, petitioner could not reasonably foresee that the First Circuit would excuse *five* separate evidentiary errors—two of which were constitutional errors—as "harmless." See Pet. 14 n.12. Thus, the suggestion of waiver merely reveals respondent's obvious recognition of the importance of the legal issue decided by the opinion below.

Second, respondent argues that the admission of evidence relating to the President's scholarship or the Dean's curriculum decisions in question did not infringe upon or otherwise chill academic speech. Opp. 19-20. That is simply wrong. With respect to respondent's distortion of the President's scholarly speech as evidence of his "sexist" attitudes, the First Circuit stated:

> We fear, moreover, the chilling effect that admission of such remarks could have on academic freedom. Use of such evidence . . . could cause a university president, dean or teacher to avoid topics of this kind altogether for fear that one or two sentences might later be used as evidence of alleged discriminatory animus.

Pet. App. 27a. Of course, the First Circuit's "fear"—that scholarly commentary might be chilled by evidentiary abuse—was realized in this case and the court therefore concluded that "it was error to admit these remarks."

The First Circuit's conclusion with respect to evidence of the Dean's curiculum decisions was even more blunt:

> A dean should not have to fear that he cannot express his opinion as to the *quality* of a particular studies program without this criticism being brought forward as evidence of sexism.

Pet. App. 29a (emphasis in original). The admission of this evidence was erroneous because of its complete lack of relevance and "because of its effect on free speech in a university." *Id.* Thus, respondent's statement that the court of appeals expressed only a "prudential" or "abstract" concern for First Amendment issues (Opp. 20) ignores the plain findings of infringement. The First Circuit's "only" error was in allowing the infringement to go unremedied.

Finally, respondent argues that the question of whether the "beyond a reasonable doubt" standard should be applied to "constitutional errors in civil cases is not a serious and important issue demanding this Court's review by certiorari." Opp. 21. However, this Court has specifically noted the existence of the issue and the fact that (at least for this Court) it was an open question. See Pet. 25. At least three circuits have split on the issue of whether there should be different standards of harmless error in civil and criminal cases (see *id.*) and the issue has been repeatedly addressed by the most respected commentators on evidence and civil procedure. *Id.* Most important, if petitioner is correct that the heightened standard of *Chapman* v. *California*, 386 U.S. 18, 21 (1967), is applicable in the civil context, then the decision below clearly is incorrect and in conflict with *Chapman*.

Thus, the question is more than just "an interesting intellectual proposition" (Opp. 21); it is a question of substantial and recurring importance to persons in the academic community who are now subject to liability based, at least in part, on the evidentiary misuse of their academic publications and decisions. The decision below, shielding such misuse from meaningful review by means of a limited "harmless error" analysis, presents an important question of federal law which should be addressed by this Court.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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